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No. 01-172

In the Supreme Court of the United States

BIOMET, INC., PETITIONER,

v.

DR. RAYMOND G. TRONZO, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT S. HACKLEMAN
GUNSTER, YOAKLEY & STEWART, P.A.
500 East Broward Boulevard, Suite 1400
Fort Lauderdale, FL 33394
(954) 462-2000

JAMES F. DAVIS
Counsel of Record
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 783-0800

Counsel for Respondent

37pp

QUESTION PRESENTED

Whether the mandate issued by the court of appeals in a first appeal from a final judgment, which left undisturbed the punitive damages award against petitioner and remanded only on compensatory damages, precluded petitioner from subsequently challenging the punitive award on grounds that the court of appeals found petitioner could have raised in the first appeal but that petitioner had waived in the first appeal for strategic reasons.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Dr. Raymond G. Tronzo, respectfully urges the Court to deny Biomet's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit. The Federal Circuit's unanimous decision does not conflict with decisions of other circuits, is fully consistent with the decisions of this Court, and does not otherwise raise important constitutional or federal questions warranting this Court's review.

STATEMENT OF THE CASE

A. Introduction And Overview

The petition challenges the application of the traditional mandate rule to the particular and novel circumstances of this case. Even a brief overview of the facts demonstrates

that the court of appeals' decision was correct and does not warrant further review.

Insofar as relevant here, the jury in *Tronzo I* awarded respondent $7.1 million in compensatory damages and $20 million in punitive damages for petitioner's intentional torts of fraud and breach of a confidential relationship under state law. The record established that petitioner had "substantially profited" (Pet. App. 23a) from its wrongful conduct, earning $88 million in profits on sales of $143 million from its scheme. (TrI App. 3401, 3415, 3445).[1]

In post-trial motions for judgment or a new trial, petitioner contended that respondent was entitled only to either nominal damages or a few thousand dollars in compensatory damages. Based on that contention, petitioner argued that the punitive damages award was excessive under state law because, *inter alia*, it bore no reasonable relationship to the proper amount of compensatory damages. Petitioner raised no federal constitutional challenge to the punitive damages award. (TrII App. 1064, 1110). The district court rejected petitioner's assertions and entered a $20 million punitive damages judgment. (TrI App. 13-14).

Petitioner appealed the final judgment on the state law claims on various grounds. By its own admission and as a matter of strategy, petitioner presented no issue—on state or federal constitutional grounds—arguing that the punitive damages were excessive or requesting that the court of appeals remand punitive damages for further consideration in the event compensatory damages were vacated and remanded for recalculation. In its decision, the court of appeals vacated the award of compensatory damages and remanded for further proceedings on that issue. As the district court recognized on remand, and as the court of appeals confirmed in

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[1] "TrI App." refers to the joint appendix in the court of appeals in *Tronzo I*. "TrII App." refers to the joint appendix in the court of appeals in *Tronzo II*.

Tronzo II, the appellate mandate in *Tronzo I* reversed and remanded solely on the issue of compensatory damages and left the punitive damages award—which petitioner had not challenged or requested be remanded—undisturbed.

On remand, the district court in *Tronzo II* recognized that the mandate in *Tronzo I* did not affect the punitive damages. (Pet. App. 30a). The court then proceeded to redetermine compensatory damages and arrived at an award of $520 in patent processing costs—an amount that even the district court recognized "does not adequately reflect the actual harm caused." (Pet. App. 24a).

Because it had reduced the compensatory damages, and notwithstanding its earlier recognition that the mandate in *Tronzo I* had left untouched the $20 million award of punitive damages, the district court allowed petitioner to argue—for the first time in any court in this case—that the punitive damages were excessive under the federal Constitution, relying particularly on the ratio of the punitive damages to the greatly diminished compensatory damages. Based on that argument, the court reduced the punitive damages to $52,000 on federal constitutional grounds. Accordingly, in contrast to the judgment for respondent of $27.1 million entered by the district court in *Tronzo I*, the judgment in *Tronzo II* came to $52,520. But the district court expressly recognized that it might have been "wrong" in allowing petitioner to assert its new punitive damages argument under the *Tronzo I* mandate and that this presented "an issue of law" that "an appellate court could tell you off the bat." (TrII App. 1326).

On appeal, the Federal Circuit in *Tronzo II* upheld the district court's award of compensatory damages but reversed its drastic reduction of punitive damages on the ground that the district court could not reconsider that punitive award in *Tronzo II* under the mandate in *Tronzo I* remanding for a determination of compensatory damages. Because punitive damages had been entered and upheld by the district court in *Tronzo I* and were not challenged by petitioner in its appeal

from that final judgment, the mandate rule held that petitioner had waived the issue and could not attack the punitive damages for the first time in *Tronzo II*. Furthermore, reviewing the proceedings in *Tronzo I* and outlining the constitutional principles that would apply to the punitive damages award in this case, the court of appeals concluded that there were no exceptional circumstances here that would justify a departure from the well-settled mandate rule. Accordingly, without deciding the ultimate merits of petitioner's constitutional claim, the court of appeals reinstated the original award of punitive damages from *Tronzo I*. This ruling is unexceptionable and provides no basis for review by this Court.

B. The Parties And The Hip-Socket Device

Respondent, Dr. Raymond G. Tronzo, is an orthopedic surgeon and a pioneer in the field of orthopedic devices, including artificial hip implant systems that permit the total replacement of diseased hip joints. Petitioner, Biomet, Inc., is a manufacturer of prosthetic devices. (Pet. App. 2a; TrI App. 110, 123).

In the early 1980s, Biomet sought Dr. Tronzo's help in developing an acetabular cup, the top-most device in a hip system installed into a patient's hip socket. At that time, most acetabular cups were glued into the hip joint with bone cement. Biomet requested Dr. Tronzo to create an alternative hip system without cement. After several years of experimentation, Dr. Tronzo developed a new cup for use without cement. Dr. Tronzo also provided Biomet with his own clinical studies showing that the device worked. (Dr. Tronzo's Resp. Br. in *Tronzo I*, at 2-3, 33-36; TrII App. 1140-47).

The device, designed for use without cement, failed if installed with cement. Dr. Tronzo accordingly refused to go along with Biomet's plan illegally to gain approval to market the device by falsely stating to the Food and Drug Administration ("FDA") that the device was designed for use with

cement. In response, Biomet stole Dr. Tronzo's invention, created a knock-off, named it the Mallory-Head cup after two doctors who were willing to participate in Biomet's plan, and submitted a false application to the FDA. Based on this scheme, Biomet earned $88 million in profits on sales of $143 million.[2] (Pet. App. 23a; TrI App. 3401, 3415, 3445).

C. District Court Proceedings In *Tronzo I*

In 1991, Dr. Tronzo sued Biomet for patent infringement and for fraud, breach of a confidential relationship, and unjust enrichment under state law. Following a ten-week trial, the jury found for Dr. Tronzo on the patent claim resulting in an award of $5,707,500.[3]

In addition, the jury found for Dr. Tronzo on his tort claims. First, it found that Dr. Tronzo had a confidential relationship with Biomet, and that Biomet breached that relationship. Second, the jury found that Biomet defrauded Dr. Tronzo by offering to pay for his development (and patent) with no intention to do so. Third, the jury found that Biomet was unjustly enriched from its wrongdoing. (TrII App. 1015-25).

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[2] The evidence at trial demonstrated the following: Biomet, through its FDA application, told that agency that the Mallory-Head cup was the substantial equivalent of then-approved cemented cups in order to get prompt approval to market. Furthermore, Biomet told the FDA that the new cup *relied* on cement, which was false. Upon approval, the label on the new device called for use with cement. Biomet's chairman testified it was reasonable to estimate that half of the cups were installed properly without cement, thus indicating that the other half were installed improperly with cement. (TrI App. 2995-97, 3028, 3115, 3121, 3850, 3872, 4208, 10517-35).

[3] The court of appeals reversed the patent judgment in *Tronzo I*, and that claim is no longer involved in the case. Because of the existence of the patent claim, the appeals in this case (even on the state law claims) were within the exclusive jurisdiction of the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295.

On the issue of punitive damages, the jury was instructed without objection that the amount of any punitive damages award should serve "as punishment [against Biomet] and as a deterrent to others" based on "malice, willfulness or callous and reckless indifference to the rights of others." (TrI App. 8029). The record showed that Biomet's wrongful conduct resulted in an ill-gotten profit to it of $88 million on sales of $143 million, and that Biomet paid Drs. Mallory and Head $5 million each to participate in its scheme. (Dr. Tronzo's Resp. Br. in *Tronzo I*, at 5; Dr. Tronzo's Resp. Br. in *Tronzo II*, at 49). As the district court thus summarized, Biomet "substantially profited" from its wrongful scheme. (Pet. App. 23a).

The jury awarded Dr. Tronzo (i) $7,134,000 in compensatory damages and $20 million in punitive damages on the fraud claim; (ii) $4,757,000 in compensatory damages and $15 million in punitive damages on the breach of a confidential relationship claim; and (iii) $4,750,000 in compensatory damages on the unjust enrichment claim. (TrII App. 1023-25.) The district court subsequently dismissed the unjust enrichment award on the ground that the other relief provided an adequate remedy at law. Reasoning that the damages for fraud and breach of a confidential relationship overlapped with each other, the court then took the larger of the remaining two awards, *i.e.*, the fraud cause of action, and entered a final judgment on that claim of $7.1 million in compensatory damages and $20 million in punitive damages, a total of $27.1 million. (TrI App. 13-14, 139).

Biomet thereafter filed separate motions for judgment or a new trial on the fraud claim and on the breach of confidential relationship claim. Both motions were based entirely on state law and raised no federal constitutional issue. In the former motion, Biomet contended that "at best the only [compensatory] damages that Dr. Tronzo could have suffered in this case would have been a few thousand dollars in patent costs," and therefore that the punitive damages were excessive because they did not bear a "reasonable relation to the amount of damages proved and the injury suffered" as re-

quired by state law.[4] (TrII App. 1064-65). Even more strongly, Biomet asserted in the latter motion that Dr. Tronzo could obtain only "nominal [compensatory] damages" and that once again the punitive damages were excessive in relation to compensatory damages under state law.[5] (TrII App. 1110-11). Thus, the very comparisons between punitive damages and the proper measure of compensatory damages that Biomet now contends were speculative and unforeseeable until the remand proceedings in *Tronzo II* in fact were contemplated and raised by Biomet in the district court in *Tronzo I*. The court rejected Biomet's post-trial motions and confirmed the final judgment of $27.1 million. (TrI App. 13-14, 166).

D. Appeal In *Tronzo I*

On appeal, the Federal Circuit affirmed Biomet's liability on the state law claims. (Pet. App. 44a). However, the court found the evidence of "Tronzo's actual injury" to be insufficient because there was no "nexus between the damages claimed and the injury incurred." (*Id.*) Thus, the court vacated the compensatory "award of lost profits . . . or a reasonable royalty as damages for the torts asserted" on the ground that they did "not properly reflect Tronzo's actual injury" (*id.* at 45a), and it remanded for the district court to determine whether there was evidence in the record "to prove any of the costs and injuries incurred by Tronzo, such as the costs of prosecuting the patent and lost business opportunities." (*Id.* at 46a). Embodying this ruling, the concluding paragraph of the court's opinion states in pertinent part: "We affirm the district court's judgment of liability under the state law claims but vacate and remand for the district court to

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[4] Under this argument, the ratio between punitive and compensatory damages would be somewhere on the order of 5000:1-10,000:1.

[5] Under this argument, assuming "nominal" damages to be $1, the punitive-to-compensatory-damage-ratio would be 15,000,000:1.

determine an appropriate award of damages in accordance with this opinion." (*Id.*)

At no point in the *Tronzo I* appeal did Biomet raise any challenge—under either state law or the U.S. Constitution—to the punitive award. Its only reference to punitive damages was the passing assertion in three footnotes that punitive damages would fall as a matter of state law if the court of appeals held either that there was no liability or that there were no compensatory damages to support a punitive award. (TrII App. 1119-20, at n.16; 2046-47, at nn. 9-10).[6]

Indeed, when Dr. Tronzo discussed the basis for the punitive damages award in his opposition brief on appeal, Biomet responded in its reply brief that "the jury's punitive damages awards were not directly challenged in Biomet's opening brief," and that the only argument Biomet directed to punitive damages was that "the punitive damages awards fall automatically once the related compensatory awards fall." (TrII App. 1119-20, at n. 16). Biomet further made clear that punitive damages had little "if any relevance to any actual issue involved in this appeal." (Biomet Reply Br. in *Tronzo I*, at 22); (TrII App. 1120) (in response to Dr. Tronzo's discussion of Biomet's willful and wanton conduct relating both to Dr. Tronzo and the FDA, Biomet stated that the discussion was a "transparent" attempt to "bias the Court and distract it

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[6] Biomet's assertions were based on its erroneous understanding of applicable Florida law. Unlike many jurisdictions, Florida allows punitive damages even if there are no compensatory (including nominal) damages. Rather, it is the defendant's misconduct establishing liability for punitive damages that supports the awarding of such damages entirely irrespective of compensatory damages. *See Ault v. Lohr*, 538 So.2d 454 (Fla. 1989). For this reason, the Eleventh Circuit, applying Florida law, has—directly contrary to Biomet's submission—affirmed an award of punitive damages while reversing compensatory damages. *See AdVantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 943 F.2d 1511 (11th Cir. 1991). This disagreement between the parties over this issue of state law is one of the reasons this case is inappropriate for this Court's review.

from the merits of Biomet's appeal"). Thus, Biomet expressly and vigorously acknowledged that it had raised no punitive damages issue in *Tronzo I*.

This approach reflected a deliberate strategy choice on Biomet's part. For evident reasons, Biomet did not want the court of appeals to consider the serious misconduct supporting punitive damages. Instead, it took a calculated risk that it could get the punitive damages overturned if it could obtain a reversal of state law liability on the claims for fraud and breach of a confidential relationship or if it could overturn all compensatory damages. Unfortunately for Biomet, its strategy (which misperceived Florida law) failed, and thus its decision to refrain from challenging punitive damages in *Tronzo I* left it subject to $20 million in such damages following the Federal Circuit's decision.

E. Remand Proceedings In *Tronzo II*

On remand, the district court in *Tronzo II* recognized that Biomet had not challenged the punitive damages on appeal in *Tronzo I* and that "the Federal Circuit's mandate does not disturb the punitive damages award." (Pet. App. 30a). Indeed, Biomet's counsel conceded that it "never challenged [in *Tronzo I*] either, the underpinnings of punitive damages being based on wanton and willful conduct, that is the heightened liability . . . or the amount of punitive damages." (TrII App. 1319); *see also* Biomet's Reply Mem. in Supp. of its Mot. to Reduce Punitive Damages, at 2, n.1 (emphasis added) ("Biomet has conceded all along that [it] did not challenge that Dr. Tronzo would be entitled to an affirmance of the punitive award unless Biomet prevailed on one or more of its appellate arguments *that would necessarily eliminate the punitive award*."). Thus, as the district court aptly summarized:

> You [Biomet] had a judgment from a jury and you went and took an appeal, and you apparently told the appellate court, this part of the judgment we are not contesting, there is a

> 20 million dollar judgment, we are not contesting it now. The appellate court is saying we affirm, but for those compensatory damages.

(TrII App. 1321). Against this undisputed background, the district court "reinstate[d] the award of punitive damages in the amount of twenty million dollars." (Pet. App. 30a-31a).

At the same time, pursuant to the remand order in *Tronzo I*, the district court concluded that Dr. Tronzo's out-of-pocket damages were $520 (Pet. App. 28a), and accordingly it reduced the compensatory damages from $7.1 million to $520. (*Id.* at 30a). In doing so, however, the court forthrightly acknowledged that "[i]n this case, the award of compensatory damages does not adequately reflect the actual harm caused." (*Id.* at 24a).

In light of this dramatically reduced compensatory award, Biomet then argued that the punitive damages award was constitutionally excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), primarily because the ratio between the punitive and compensatory damages was now 38,000:1. Although the district court previously had recognized that the appellate mandate in *Tronzo I* had not affected the punitive damages and therefore the $20 million awarded in *Tronzo I* remained the proper and undisturbed amount under the mandate, it nonetheless allowed Biomet to make this argument notwithstanding the mandate rule. What is more, the court accepted Biomet's argument, concluding that the federal Constitution precluded a punitive damages award of more than $52,000 based on a compensatory award of $520. Thus, the court entered a judgment of $52,520 in *Tronzo II* on the state law claims. In so ruling, the district court admitted that its "view" that Biomet could raise this issue notwithstanding the mandate rule "may be wrong. . . . This is an issue of law. That is something that an appellate court could tell you off the bat." (TrII App. 1326). The district court also noted that "Biomet misled Dr. Tronzo and substantially profited thereby"; that Biomet "made false statements to the

FDA"; that "this conduct warrants punitive damages"; and that Biomet was a company of "substantial means." (Pet. App. 23a-24a).

F. Appeal In *Tronzo II*

On Dr. Tronzo's appeal in *Tronzo II*, a unanimous panel of the Federal Circuit affirmed the district court's reduction of compensatory damages to $520 but reversed the district court's reconsideration of the punitive damages on the ground that it was beyond the scope of the mandate in *Tronzo I*.[7] The court held that the mandate in *Tronzo I* vacated only the compensatory damages and left the punitive award intact, and therefore under the mandate rule Biomet was not automatically entitled, as it claimed, to mount a constitutional excessiveness attack for the first time in *Tronzo II*.[8]

The court of appeals found that Biomet had waived its challenge to the punitive damages by failing to appeal the punitive damages award, and was therefore barred from raising it on remand. (Pet. App. 9a). The court rejected Biomet's argument that it had "indirectly" appealed the punitive damages, in *Tronzo I*, finding that argument "not persuasive." (*Id.*).

The court of appeals emphasized that Biomet had presented no punitive damages issue in the *Tronzo I* appeal, ex-

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[7] The panel in *Tronzo II* was the same as *Tronzo I* except Judge Lourie replaced Judge Rich, who had died in the interim.

[8] Not only is that reading of the *Tronzo I* mandate clear in the context of that opinion, as the district court recognized (Pet. App. 30a-31a), but it was confirmed in *Tronzo II* by Judge Archer (Pet. App. 11a), who wrote the opinions for the court in both *Tronzo I* and *Tronzo II*. Moreover, to the extent there was an ambiguity in the *Tronzo I* mandate, Biomet failed to seek rehearing or clarification at the time. And clearly the issue of the correct interpretation of a mandate in an individual case hardly warrants this Court's review.

plaining that "[i]t is uncontroverted that Biomet never appealed, nor questioned in any way, the *amount* of the punitive damages on appeal to this Court in *Tronzo I*." (Pet App. 9a) (emphasis in original). Moreover, the court stressed that Biomet had raised an excessiveness argument under state law in the district court in *Tronzo I* based, *inter alia*, on the ratio between the punitive award and proper compensatory damages that Biomet itself had contemplated would be only nominal or at most a few thousand dollars. (This assessment, of course, proved quite close to the compensatory damages of $520 entered by the district court on remand that was the basis for Biomet's new-found constitutional argument in *Tronzo II*.) (*See id.* at 11a). The district court in *Tronzo I* had rejected Biomet's state law excessiveness argument and sustained the punitive award of $20 million, and that ruling and award were embodied in the final judgment that Biomet appealed in *Tronzo I* – without a word challenging the propriety of the punitive damages. As the Federal Circuit thus stated:

> The district court had ruled on the issue of punitive damages in its initial decision and had further responded to Biomet's challenge to the appropriateness of the amount of punitive damages. Then, while disputing various rulings of the district court on appeal, Biomet chose not to contest the amount of punitive damages.

(*Id.*) Therefore, "[b]ecause Biomet failed to raise this issue, clearly implicated in the initial decision of the district court, our mandate in *Tronzo I* acted to prevent Biomet from raising this issue on remand . . . ." (*Id.*)

The court of appeals further noted that Biomet could have raised its constitutional excessiveness argument in *Tronzo I*. To be sure, one of the *BMW* factors—the ratio between the punitive and compensatory awards—changed as

a result of the district court's reduction of compensatory damages in *Tronzo II*.[9] But as the Federal Circuit correctly recognized, the constitutional issue is not simply a function of that ratio. Furthermore, in this case, there was no change between *Tronzo I* and *Tronzo II* in such critical factors as (i) the absolute amount of the punitive award; (ii) the relationship between that award and both the reprehensibility of Biomet's misconduct and the level of fines, penalties or other punitive awards for analogous conduct (the other two *BMW* factors); and (iii) the relationship between Biomet's ill-gotten profits of $88 million and the punitive damages award of $20 million, which was designed to punish and deter Biomet's misconduct and to deprive Biomet of the fruits of its wrongdoing.

Finally, the court of appeals, *sua sponte*, recognized that the mandate rule was a prudential doctrine rather than a jurisdictional limitation and that, in the court's discretion, the rule might not be strictly applied in "exceptional" circumstances where there has been a "substantial" change in the material considerations that would render an appellant's waiver of an issue inappropriate. (Pet. App. 12a-13a). Here, however, the court of appeals concluded that no such exceptional circumstances existed. The court correctly understood (for the reasons discussed *supra*) that the waiver issue arose in this case only because Biomet could have raised the excessiveness issue in *Tronzo I* but failed to do so (and indeed deliberately chose not to do so for strategic reasons, *see* pages 8-9, *supra*). Furthermore, turning to the constitutional standards for excessiveness, the court concluded that Biomet's argument simplistically and improperly sought to give controlling weight to the single factor of the ratio between the punitive and compensatory awards and ignored the

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[9] Ironically, Biomet is now defending a punitive damages award where the ratio is 100:1 (*viz.* 52,000:520), even though defendants often challenge punitive awards with much lower ratios (including 1:1, *see* page 23, *infra*).

other, and in many ways more significant, aspects of the due process test, including in particular the relation between the punitive award and Biomet's reprehensibility and ill-gotten gains. Thus, in this case, where Biomet was represented at all times by able and experienced counsel, there were no exceptional circumstances that would relieve Biomet of the consequences of the traditional mandate rule. Accordingly, without reaching the ultimate merits of Biomet's constitutional challenge, the court reinstated the punitive damages award from *Tronzo I*. Subsequently, Biomet's petition for rehearing en banc was unanimously denied.

REASONS FOR DENYING THE PETITION

The question presented in the petition rests on the erroneous premise that the Federal Circuit's opinion categorically forecloses due process challenges to punitive damages awards following remand unless a hypothetical constitutional attack was made in an earlier appeal from a final judgment. But the court of appeals never rendered any such holding. Contrary to Biomet's restatement of the decision below, the Federal Circuit determined that the arguments Biomet belatedly sought to assert in *Tronzo II* were available to it in *Tronzo I* and were, for strategic reasons, waived. Accordingly, the question articulated in the petition is not presented in this case and thus does not merit this Court's review.

In any event, the circumstances of this case make it decidedly unusual and an inappropriate candidate for review. This is an action where, on appeal from a final judgment, Biomet deliberately opted not to challenge the imposition of a $20 million punitive damages award, by far the largest single component of the judgment. Biomet, in fact, aggressively urged the court of appeals not even to consider the egregious facts that justified the assessment of punitive damages against it. Having taken Biomet at its word, the Federal Circuit was fully justified—in *Tronzo II*—in holding Biomet to its word. No rule of law or principled view of equity suggests that this case warrants any further review.

I. THE FEDERAL CIRCUIT'S OPINION DOES NOT REQUIRE THE ASSERTION OF HYPOTHETICAL ARGUMENTS

A. The Petition For Certiorari Obscures The Issues Presented Here

Before turning to the flaws in petitioner's argument, it is important to emphasize that many of the collateral issues discussed in the petition are simply not presented in this case. Chief among the irrelevant matters is the purported constitutional excessiveness of the $20 million punitive award. As even the Defense Research Institute recognizes in its *amicus* brief (at pages 9-10), the court of appeals did not uphold the punitive damages verdict *on the merits*. To the contrary, the court concluded that, in light of Biomet's waiver, it need not reach the due process issue. (Pet. App. 12a-15a). While the Federal Circuit referenced the guideposts articulated in *BMW*, it did so only in the context of describing why there was no change in circumstances justifying an exception to the mandate rule. The court never reached the question of how it would have applied the *BMW* guideposts here had Biomet adequately presented a challenge to the punitive award. Biomet's suggestion otherwise (Pet. 25-26) is belied by the record and, indeed, by its own statement of the question presented in the petition.

In addition to not presenting a punitive damages issue, the instant action has nothing to do with patent law. Dr. Tronzo's patent claims have long been gone from this case. What remains is a *state law* cause of action, and the issue before this Court revolves exclusively around the enforcement of Biomet's waiver of defenses to that state law claim. Biomet's invocation of the Federal Circuit's nationwide jurisdiction over patent matters (Pet. 27) does not have any bearing on the question presented in the petition.

The protestations of petitioner and its *amici* notwithstanding, the decision below also is not inherently hostile to the interests of defendants. The Federal Circuit applied a

neutral rule of appellate procedure that requires all appellants to raise—or be deemed to have waived—any and all available issues on appeal from a final judgment. There is nothing unfair or discriminatory in such a rule.

B. The Decision Below Does Not Conflict With The Final Judgment Rule

In an attempt to avoid the consequences of its failure to challenge the punitive award in *Tronzo I*, Biomet insists that the reduction in the compensatory award following remand automatically afforded it a new opportunity to wage a constitutional attack on the size of the unchanged punitive damages award. Its waiver of this issue in the earlier appeal, Biomet maintains, is immaterial in the wake of the revised punitive-to-compensatory-damages ratio. (Pet. 19, 21). This argument runs directly counter to the purposes of the final judgment rule.

Appellate jurisdiction is limited by 28 U.S.C. § 1291 to "final decisions" of the district courts. This statutory requirement is designed primarily to ensure that parties "raise all claims of error in a single appeal following final judgment on the merits." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 429-30 (1985) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)). By virtue of this rule, courts avoid the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

In the case at bar, all litigated issues had been resolved following the conclusion of the trial and the resolution of post-trial motions. With respect to punitive damages, Biomet expressly argued in a Rule 50/59 motion that the punitive award was excessive as a matter of law and should be reduced. (TrII App. 1064-65). It insisted, rather presciently, that "at best the only damages that Dr. Tronzo could have suffered in this case would have been a few thousand dollars in patent costs," and thus the punitive award bore no reason-

able relation to the injury suffered or the proven compensatory damages. (*Id.*) This is not a hypothetical argument; it is the argument Biomet actually made in the district court prior to the first appeal. Accordingly, there is no valid reason why Biomet could not have raised an identical argument on constitutional grounds before the Federal Circuit in *Tronzo I*.

Nevertheless, after the district court denied its post-trial motion, Biomet, for its own strategic reasons, *affirmatively disavowed* any appellate attack on punitive damages, confining its arguments instead to compensatory damages. As noted earlier, *supra* at page 8, the only references to punitive damages in Biomet's appellate briefing were three footnotes contending (erroneously)[10] that if the compensatory award were reduced to zero, the punitive award must be similarly reduced to zero. Removing any doubt about the scope of this waiver, Biomet's counsel candidly acknowledged at a hearing on remand that Biomet "never challenged either the underpinnings of punitive damages being based on wanton and willful conduct . . . or the amount of punitive damages." (TrII App. 1319); *see also* Biomet's Reply Mem. in Supp. of its Mot. to Reduce Punitive Damages, at 2, n.1 (emphasis added) ("Biomet has conceded all along that [it] did not challenge that Dr. Tronzo would be entitled to an affirmance of the punitive award unless Biomet prevailed on one or more of its appellate arguments *that would necessarily eliminate the punitive award.*").

The fact that Biomet felt it might have a stronger constitutional argument if the compensatory damages were subsequently reduced is not a legitimate basis for forgoing a substantive due process challenge to the punitive award at the

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[10] *See* note 6, *supra*. Moreover, these footnotes were insufficient to raise an appellate issue under Rule 28 of the Federal Rules of Appellate Procedure. *See Williams v. General Elec. Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998) ("The plaintiff's claim . . . which appeared in their brief in a solitary footnote is insufficiently developed on appeal and is therefore waived."), *cert. denied*, 527 U.S. 1035 (1999).

outset.[11] Indeed, if the court of appeals had simply affirmed on liability and compensatory damages or reduced the compensatory award as a matter of law (as the district court did here), there would have been no remand and no opportunity to assert any "new" defenses to the previously unchallenged punitive damages award.

Biomet's omission is particularly glaring—and this case is particularly inappropriate for the Court's review—because, under governing Florida substantive law, punitive damages are wholly independent from compensatory damages. Appellate courts applying Florida law are free to affirm punitive awards while remanding for new trials solely on compensatory damages. *See Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 943 F.2d 1511, 1520 (11th Cir. 1991); *Gimbert v. Lamb*, 601 So.2d 230, 231 (Fla. Dist. Ct. App.), *review denied*, 613 So.2d 3 (Fla. 1992); *Miami Nat'l Bank v. Nunez*, 541 So.2d 1259, 1259 n.1 (Fla. Dist. Ct. App. 1989); *Zambrano v. Devanesan*, 484 So.2d 603, 610 (Fla. Dist. Ct. App.), *review denied*, 494 So.2d 1150 (Fla. 1986).[12] In short, as the Federal Circuit held, Biomet

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[11] This Court's decision in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), is instructive in this regard. There, a corporate debtor executed a cognovit note conferring authority upon its creditor to obtain a judgment against the debtor without the debtor's notice, hearing, or opportunity to assert defenses. After the creditor secured its judgment, the debtor sought to stay its execution on grounds that the note was unenforceable as violative of the Due Process Clause. In particular, the debtor claimed that the Constitution does not recognize the waiver of rights that have not yet arisen. *Id.* at 184. Rejecting this argument, the Court held that while the debtor "may not have been able to predict with accuracy just how or when [its creditor] would proceed under the [note], . . . this inability does not in itself militate against effective waiver." *Id.* at 187. *Cf. Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-83 (1989) (pre-dispute agreements to arbitrate are fully enforceable and can waive right to jury trial of later-arising disputes).

[12] In light of this jurisprudence, Biomet's suggestion that the "distinct and separable" doctrine of *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931), prohibited the Federal Circuit from remanding for a new trial only on compensatory damages after the first

(footnote continued on next page)

had available to it a ripe and concrete constitutional claim at the time of *Tronzo I*. The fortuity of a remand in this case provides no warrant for breathing new life into a claim that Biomet expressly abandoned in its earlier appeal.

Not only did Biomet fail to raise a punitive damages issue in *Tronzo I*, it never even requested the court of appeals to vacate and remand the punitive award for further consideration if the court (as it did) vacated and remanded the compensatory damages. At least that much would have apprised the Federal Circuit of the precise relief Biomet was seeking and would have allowed the court to formulate an appropriate mandate in an informed and deliberate manner. Federal Rule of Appellate Procedure 28(a)(10), which requires appellants to include in their initial brief a "short conclusion stating the precise relief sought," was adopted for this very purpose.

Biomet, in fact, made that type of request in its footnotes arguing that (in its view) punitive damages should fall if there was either no liability or no compensatory damages under state law. These results were no less "hypothetical" than the result actually obtained. But Biomet failed to take the next step of providing a further statement of what the court should order with respect to punitive damages if compensatory damages were reduced or remanded. Had Biomet argued that, in the event of a reduction in the compensatory award, the constitutionality of the punitive verdict should also be re-examined, the matter would have been joined with all other issues in *Tronzo I*, and the objectives of the final judgment rule would have been satisfied. As *amici* candidly acknowledge, the failure to take this next step could have been easily rectified here and was nothing more than an ill-

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appeal is erroneous. Nothing in *Gasoline Products* either prohibits the waiver of arguments that are not properly preserved, or raises a question about a remand for new trial only on compensatory damages where liability has been affirmed and no issue of punitive damages remains in the case.

fated "judgment call" by Biomet. *See* Amicus Br. of Chamber of Commerce, at 3 & n.3.

In the end, Biomet affirmatively and forcefully informed the Federal Circuit that it was making no challenge to the $20 million punitive damages award on appeal from the final judgment. It urged the appellate court to ignore all references to punitive damages. There is no unfairness in the Federal Circuit's ruling that Biomet cannot deliberately divert judicial gaze away from punitive damages (and, by extension, the true reprehensibility of its underlying conduct and the extent of its massive ill-gotten profits) and then, after that strategy fails—leaving it liable for $20 million in punitive damages—later pursue a new attack on the award.

Affording Biomet an opportunity to challenge the punitive award on constitutional grounds here would be particularly inequitable given its statements to the Federal Circuit. Far from creating a "trap" for the unwary (Pet. 26), the court of appeals simply took Biomet at its word. There is, accordingly, no justification for this Court to grant review of Biomet's request for a rule that would allow it to tell the appellate court that it is accepting the validity of the $20 million punitive damages award, and yet later assail that award as constitutionally suspect. Such gamesmanship should not be countenanced.

C. The Reduction Of The Compensatory Award Following The First Appeal Did Not Materially Alter The Constitutional Excessiveness Calculus

Biomet maintains that any constitutional challenge to the punitive award it might have asserted in the first appeal would have been hypothetical and devoid of merit. (Pet. 5) ("Biomet had no reasonable basis in *Tronzo I* to raise a constitutional attack on the severity of the punitive damages award."). But it contends that any change in the compensatory damages award on remand automatically resurrected its

otherwise waived constitutional claim. Biomet's argument crumbles at the touch.

What Biomet essentially proposes here is to elevate the ratio guidepost in the *BMW* constitutional excessiveness analysis to *dispositive* status. Under Biomet's theory, *any* change in the ratio on remand—no matter how *de minimis*, and notwithstanding that a defendant deliberately chose not to raise a constitutional objection to the punitive award in the earlier appeal—fundamentally alters the legal landscape and offers an appellant a renewed opportunity to mount claims that were previously waived.[13] Such a proposal would not only do serious violence to notions of finality and undermine firmly established appellate waiver principles, but it also would unnecessarily constrict the scope of the relevant *BMW* ratio inquiry.

As this Court has explained, the Due Process Clause of the Constitution requires only that the size of a punitive damages award not be grossly disproportionate to the severity of the offense.

> Punitive damages may properly be imposed to foster a State's legitimate interests in punishing unlawful conduct and deterring its repetition. . . . Only when [a punitive] award can fairly be characterized as "grossly excessive" in relation to these interests does it enter

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[13] Biomet's contention that the contingent relationship between punitive and compensatory damages is confirmed by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), reflects a misreading of that case. This Court compared the two types of awards in that case simply to underscore that punitive damages do not entail factual findings by the jury and thus do not implicate the Seventh Amendment's Reexamination Clause. *Id.* at 1686. In no way did the Court suggest that challenges to the constitutional excessiveness of punitive damages awards cannot be waived by the failure to assert such a claim in the appeal of a final judgment, irrespective of whether the compensatory award is disturbed on appeal.

> the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

BMW, 517 U.S. at 568 (citations omitted). This constitutional limitation ensures that the punitive award is reasonable in amount and rational in light of its purpose "to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991). The guideposts outlined in *BMW* were never intended to operate as an analytical straitjacket; they were simply designed to probe that rational relationship. *Zimmerman v. Direct Fed. Credit Union*, No. 01-1007, 2001 U.S. App. Lexis 19596, at *29-*30 (1st Cir. Sept. 4, 2001).

In situations like the case at bar, where (i) the $20 million punitive damages award represents only a fraction of the defendant's $88 million in ill-gotten profits, (ii) the district court itself concluded that the $520 compensatory award "does not adequately reflect the actual harm caused," (Pet. App. 24a), and (iii) such a compensatory award is trivially small,[14] the ratio guidepost takes on far less importance.[15] *See generally BMW*, 517 U.S. at 581-82 n.34 (excessiveness

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[14] In fact, appellate courts have affirmed punitive-to-compensatory damages ratios far larger than the 38,000:1 ratio here where only nominal compensatory awards have been imposed. *See, e.g., Klein v. Grynberg*, No. 96-1255, 1997 WL 643899 (10th Cir. Oct. 20, 1997) (150,000:1) (unpublished); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (75,000:1); *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256 (Ga. Ct. App. 1996) (45,000:1).

[15] The punitive-to-compensatory ratio is particularly unhelpful in Florida because state law permits punitive damages to be awarded even in the complete absence of a compensatory award. *See Ault v. Lohr*, 538 So.2d 454, 455 (Fla. 1989); *Horizon Leasing v. Leefmans*, 568 So.2d 73, 75 (Fla. Dist. Ct. App. 1990). It is thus possible under Florida law to have a ratio of infinity. In light of this state law, there is no substantive difference between a small or nominal compensatory award and a compensatory award of zero. This simply underscores the marginal importance of the ratio factor where, as here, the compensatory award is relatively low despite the substantial reprehensibility of the defendant's conduct.

inquiry looks both at harm suffered by plaintiff as well as windfall secured by defendant); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-61 (1993) (plurality) (affirming punitive award based on defendant's sizable profits from its illegal conduct); *Haslip*, 499 U.S. at 21-22 (embracing excessiveness test that focuses in significant part on "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss").

It is undisputed here that Biomet's predicate conduct underlying the punitive award went unchallenged in the initial appeal. It is similarly uncontested that Biomet made $88 million in profits from its fraudulent scheme. Under these circumstances, the alleged constitutional excessiveness of a $20 million punitive award was an issue fully ripe at the time of the initial appeal, and it has not been materially altered merely by virtue of the reduction in the compensatory award.

Prior decisions preclude Biomet from placing such decisive importance on the punitive-to-compensatory ratio. Indeed, the record exposes a fatal irony in Biomet's contention that the low ratio prior to *Tronzo I* rendered a constitutional excessiveness claim wholly without merit. In *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000), Biomet itself—represented by the same counsel that represented it below and that continues to represent it here—mounted an appellate attack on the excessiveness of a punitive damages award that was almost identical in size to the compensatory award. Even more noteworthy, the Third Circuit ruled in its favor, slashing the punitive damages significantly. 181 F.3d at 463-70. To suggest, therefore, that any such claim would have been hypothetical, unripe, or necessarily perceived to be futile is contrary to reality and the record.[16]

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[16] In subsequently opposing a writ of certiorari from the Third Circuit's decision, Biomet emphasized that "[n]othing in *BMW* supports . . . [a] contention that a punitive damages award that bears approximately a

(footnote continued on next page)

D. The Federal Circuit's Opinion Did Not Articulate Or Apply The Automatic Waiver Rule That Biomet Attacks

Biomet implies throughout its brief that the Federal Circuit created a virtual jurisdictional waiver rule in the punitive damages context, completely foreclosing all constitutional challenges not asserted in an initial appeal from a final judgment. The court of appeals did no such thing. It specifically recognized that, in exceptional circumstances, a court may invoke its discretion to afford a party an opportunity to revisit an issue that would otherwise be deemed waived and beyond the scope of the mandate. (Pet. App. 12a). This flexibility ensures that injustices are avoided.

Seeking certiorari, Biomet takes the Federal Circuit to task for ignoring the "manifest injustice" exception to the appellate mandate rule and focusing only on the absence of a change in the evidence. (Pet. 24). But Biomet *never raised* a manifest injustice claim either in the district court on remand or in the circuit court on the second appeal. Any omission by the court of appeals, therefore, is attributable entirely to Biomet's tactical waiver of this issue.

Biomet suggests that the exception to the mandate rule should be *automatic*—not merely a matter of an appellate court's discretion—for constitutional attacks on punitive damages in the wake of reduced compensatory awards. A contrary rule, it argues, would effectively foreclose defendants from availing themselves of state law punitive caps inasmuch as these defenses frequently do not arise until after remand. (Pet. 22-23). Whatever the merits of this conten-

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one-to-one ratio to the compensatory award should, for that reason alone, be immune from constitutional challenge." *Orthofix v. EBI Med. Sys., Inc.*, No. 99-687, Respondent's Br. in Opposition, at 18 (Nov. 22, 1999). The Chamber of Commerce's *amicus* brief in the present case (page 3 n.3) also acknowledges this point, noting that "we by no means intend to suggest that the existence of a low ratio necessarily immunizes a multimillion dollar punitive award from constitutional scrutiny."

tion, no such issue is presented here because the controlling Florida law imposes no hard cap applicable to this case. *See* Fla. Stat. Ann. § 768.73(1)(b) (West 1997). In any event, as noted above, defendants in states employing hard caps must—and typically do—argue in their appellate brief that, if the compensatory award is reduced (and/or remanded), the court should reduce (and/or remand) the punitive award accordingly. There is no reasonable justification for completely omitting all discussion of the punitive award, especially where, as here, the punitive award represented by far the largest element of the final judgment.[17]

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[17] Biomet ranges far afield when it likens this dispute to a post-remand criminal sentencing in which, under prevailing jurisprudence, a trial court may consider a defendant's entire sentence anew following an appellate vacatur of the previously imposed sentence. (Pet. 16-17). The cases cited by Biomet are readily distinguishable from the instant action. The decisions all underscore that the court of appeals is free to circumscribe the district court's discretion by imposing limitations on resentencing in the mandate. *See United States v. Moored*, 38 F.3d 1419, 1422 (6th Cir. 1994); *United States v. Smith*, 930 F.2d 1450, 1456 (10th Cir.), *cert. denied*, 502 U.S. 879 (1991). There is no *automatic* exception carved out of the mandate rule, as is proposed here. Moreover, many courts treat criminal sentences that have been reversed and remanded for resentencing as if the original sentence had never been meted out. *See United States v. Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992); *Smith*, 930 F.2d at 1456. This approach is logical given that criminal sentences are imposed as a package, with components of incarceration, probation, and restitution all combining to satisfy societal objectives of punishment and deterrence. In any event, the present case surely is an inappropriate vehicle to consider the appellate rules applicable in criminal cases.

II. THE FEDERAL CIRCUIT'S OPINION IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL APPELLATE COURTS

The decision below creates no conflict for this Court to address. There is no merit to Biomet's contention that the Federal Circuit's ruling—in the unusual circumstances of this case—that Biomet's strategic litigation decision in *Tronzo I* waived any subsequent challenge to the constitutional excessiveness of a punitive damages award contravenes this Court's holding in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), and creates a split among the federal courts of appeals. (Pet. 13-18).

In *Sprague*, the facts of which are described in the petition, the "equitable costs" sought by the plaintiff clearly were "not directly in issue in the original proceedings." 307 U.S. at 168. The mandate there did not address such costs, let alone foreclose their pursuit. Unlike the case at bar, the plaintiff *could not* have asserted such a request in the original suit because her entitlement to equitable costs, which were entirely "collateral" to the underlying issues in the suit, was dependent on the outcome of the appellate process. *Id.* at 168-69. Here, of course, not only *could* Biomet challenge the excessiveness of the punitive damages award, but it *did so* in the district court prior to the first appeal (albeit only on state law grounds). After actually making an argument that the district court rejected, Biomet waived all challenges to the excessiveness of punitive damages when it expressly advised the Federal Circuit on appeal from the final judgment that punitive damages lacked "relevance to any actual issue involved in this appeal." *See* page 8, *supra.* Nothing in *Sprague*—or any other decision of this Court—suggests that

a party in these circumstances has an automatic right to assert arguments it has expressly waived and abandoned.[18]

As for the purported division among federal appellate courts on this issue, it is entirely illusory. None of the decisions relied on in the petition involved the application of the appellate mandate rule to foreclose an attack on a punitive damages award where such a challenge was affirmatively waived in an earlier appeal. At most, these cases demonstrate that there is often a relationship between compensatory and punitive damages. Not only does that unremarkable proposition have no bearing on the mandate rule, but, in contrast to many jurisdictions, it is not required by Florida law applicable in this particular case.

In *Burke v. Deere & Co.*, 6 F.3d 497 (8th Cir. 1993), after the plaintiff recovered substantial compensatory and punitive damages, the defendant appealed the underlying liability findings, the court's decision to submit a punitive damages issue to the jury, and the amount of the jury's punitive award. The Eighth Circuit vacated the jury's compensatory and punitive awards, remanded for a new trial, *and ordered the dismissal of the punitive damages claim.* The reversal of the compensatory award was predicated on various evidentiary and instructional errors, while the vacatur of the punitive verdict rested on the complete paucity of evidence supporting *any* punitive damages. *Id.* at 512 n.26. Thus, the ensuing trial on remand was limited to compensatory damages.

Burke had nothing to do with the appellate mandate issue presented in this case The only language in that opinion that could be argued to be even marginally relevant here is the majority's rejection, *in dictum*, of a proposal by the dissent that the compensatory award be preserved and a new trial be granted on punitive damages alone. *See id.* at 513 ("[E]ven if we agreed that the evidence support[ed] submis-

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[18] The Federal Circuit plainly was aware of *Sprague* and cited it in its *Tronzo II* opinion. (Pet. App. 9a n. 1)

sion of the case on the question of punitive damages, which we do not, a retrial to a new jury on that issue alone would be improper because the issues underlying compensatory and punitive awards are inextricably intertwined.").[19] The majority's analysis clearly was focused not on mandate or waiver rules, but simply on the severability of compensatory and punitive damages in a new trial under *Gasoline Products*, 283 U.S. at 500. The instant case, by contrast, simply presents no *Gasoline Products* issue where the remand was limited to compensatory damages after liability was affirmed and the punitive damages excessiveness issue waived. The Eighth Circuit in *Burke* never implied, let alone held, that a challenge to the size of a punitive damages award must remain available to a litigant who deliberately opted not to raise the issue in an earlier appeal.

Nor is a split evidenced by *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). There, a jury at the initial trial awarded the plaintiff a sizable amount of compensatory damages, but rejected her claim for punitive damages. While the defendant appealed the judgment, the plaintiff did not cross-appeal the denial of her motion for new trial on punitive damages. The Tenth Circuit later reversed the judgment and "remanded for a new trial." 948 F.2d at 1549. The defendant argued on remand that the plaintiff was barred from seeking punitive damages in the second trial by virtue of her failure to appeal the denial of punitive damages. The district court rejected this argument, and the jury in the second trial returned a substantial punitive award in favor of plaintiff. In upholding this latter verdict, the Tenth Circuit held that its earlier reversal was accompanied by a "general remand" in which "the entire question of [the defendant's] liability was at issue" in the

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[19] The Eighth Circuit relied substantially on Iowa law in holding that punitive damages were tied inextricably to compensatory damages. *Burke*, 6 F.3d at 513. As noted earlier, that principle is not the law in Florida.

new trial. *Id.* at 1552. The appellate court also deemed it "most significant" that the defendant, in the initial appeal, "challenged *any* liability on its part." *Id.* (emphasis added). Here, by contrast, the Federal Circuit did not disturb Biomet's liability on the state law claims. The discussion in *Mason*, therefore, of the legal effect of reopening liability on a punitive award is simply not relevant here.

The Fifth Circuit's decision in *Hardin v. Caterpillar, Inc.*, 227 F.3d 268 (5th Cir. 2000), is even less helpful to Biomet. The plaintiff there appealed from the district court's refusal to submit a punitive damages issue to the jury. She sought a new trial only on punitive damages and insisted that the compensatory verdict for emotional injury, which the defendant unsuccessfully challenged on appeal, be preserved. The Fifth Circuit rejected this proposal, explaining that an "award[] for emotional injury was not a sum of calculable costs" and holding that for emotional injury cases, punitive damages are intertwined with actual damages. *Id.* at 272. The court expressly reached that conclusion "without deciding that [compensatory and punitive damages] are inseparable as a matter of law across all cases; and we do not suggest that punitive damages may not walk alone in other contexts." *Id.* at 272-73 (citing case where court remanded solely for a new trial on punitive damages). The court's rejection of a punitive-damages-only retrial on the particular record in that emotional injury case is irrelevant to this case where Biomet previously waived any challenge to punitive damages. Because the Fifth Circuit never addressed matters relating to waiver or appellate mandates, its opinion is entirely inapposite to the instant action.[20]

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[20] Biomet's reliance on *Brown v. Kinney Shoe Corp.*, 237 F.3d 556 (5th Cir.) *petition for cert. filed*, 69 U.S.L.W. 3750 (U.S. May 21, 2001) (No. 00-1740), is misplaced for the same reasons. There, the Fifth Circuit reversed the trial judge's denial of defendant's motion for judgment as a matter of law on one of plaintiff's two claims, and remanded the case for a new trial. Although the defendant had specifically appealed the punitive award (in addition to the compensatory award), the appellate court

(footnote continued on next page)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT S. HACKLEMAN
GUNSTER, YOAKLEY,
VALDES-FAULI & STEWART, P.A.
500 East Broward Boulevard,
Suite 1400
Fort Lauderdale, FL 33394-3002
(954) 462-2000

JAMES F. DAVIS
Counsel of Record
HOWREY SIMON ARNOLD &
WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 783-0800

Counsel for Respondent

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declined to address the issue of punitive damages, reasoning that "[a] new determination of the compensatory injuries that flow from the [surviving] claim may fundamentally affect a jury's determination of emotional and punitive damages." 237 F.3d at 567.